Military Justice Act of 2016

Section-by-Section Analysis

Section 1 contains the short title of the bill and a table of contents for the bill.

TITLE I—GENERAL PROVISIONS

Section 101 contains amendments to Article 1 of the UCMJ concerning the definitions of "military judge" and "judge advocate," as follows:

Section 101(a) would amend the definition of "military judge" in Article 1(10) to reflect the changes in Articles 16, 19, 26, and 30a regarding the detailing of military judges. *See* Sections 401, 403, 504, and 602, *infra.*

Section 101(b) would make a technical amendment to Article 1 to reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps."

Section 102 would amend Article 2(a)(3) of the UCMJ to clarify jurisdiction over reserve component members performing periods of inactive-duty training. The amendment would provide commanders clearer authority to address misconduct that takes place during periods incident to inactive-duty training, and during intervals between inactive-duty training on consecutive days.

Section 103 would amend Article 6, which concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. Article 6(c) currently disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. The proposed amendments would expressly cover military magistrates when presiding over pre-referral proceedings under Article 30a, or when presiding, with the parties' consent, over cases referred to judge-alone special courts-martial, under Article 19. *See* Sections 403, 602, *infra.* The amendments also would revise the disqualification provision under Article 6(c) to include appellate judges and counsel (including victims' counsel) who have participated previously in the same case or in any proceeding before a military judge (to include a military magistrate designated under Articles 19 or 30a), preliminary hearing officer, or appellate court in the same case.

Section 104 would amend Article 6a of the UCMJ to align the statute with the changes proposed in Article 19 and the proposed new sections, Articles 26a and 30a, concerning military magistrates. *See* Sections 403, 507, and 602, *infra.* Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The proposed amendment would add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by

the President, consistent with federal law concerning the investigation and disposition of matters relating to the fitness of federal magistrate judges in the performance of their judicial duties.

Section 105 contains amendments related to the rights of victims under Article 6b of the UCMJ, as follows:

Section 105(a) would clarify the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, consistent with the similar provision in the Crime Victims' Rights Act. This change would conform military law to federal civilian law with respect to the procedure for appointment of individuals to assume the rights of certain victims.

Section 105(b) would clarify the relationship between the rights provided to victims under the UCMJ and the exercise of disposition discretion under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This change would conform military law to federal civilian law with respect to the relationship between the rights of victims and the duties of government officials to investigate crimes and properly dispose of criminal offenses.

Section 105(c) would move the recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses from Article 46(b) into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Implementing regulations would address a number of matters concerning the rights of victims under Article 6b, to include: the ability of victims to be heard on the plea, confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right not to be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.

TITLE II—APPREHENSION AND RESTRAINT

Section 201 would amend Article 10 to conform the language of the statute to current practice and related statutory provisions concerning restraint of persons charged with offenses and the actions that must be taken by military commanders and convening authorities when persons subject to the Code are held for trial by court-martial. The amendments would clarify the general provisions concerning restraint under Article 10, and would incorporate into Article 10 the requirement under Article 33 for prompt forwarding of charges in cases involving pretrial confinement. The amendments would expand the requirement for prompt forwarding to cover special courts-martial as well as general courts-martial, and would require the establishment of prompt processing timeframes in the Manual for Courts-Martial. Implementing rules would address pre-referral review of confinement orders by military magistrates and military judges under the proposed Article 30a, as well as the requirements for prompt disposition of offenses by military commanders and convening authorities.

Section 202 would amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. Under current law, it is a violation of Article 12 if a military member is held in "immediate association" with enemy prisoners or foreign nationals who are not members of the armed forces. Under current practice, however, it is not uncommon for non-U.S. citizens to be held in the same civilian confinement facilities where our military members are held during periods of pretrial or post-trial confinement. This practice was not anticipated by the drafters of the UCMJ in 1949. The proposed amendment to Article 12 would maintain the current strict prohibition against confining military members in immediate association with enemy prisoners of war, while clarifying that the restrictions in Article 12 relating to confinement of military member with "foreign nationals" are limited to situations in which the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. This change would ease the administrative burden placed on civilian confinement facilities that hold confined military members, and would prevent military members in these facilities from being isolated unnecessarily.

TITLE III—NON-JUDICIAL PUNISHMENT

Section 301 contains amendments concerning non-judicial punishment under Article 15. Non-judicial punishment under Article 15 provides commanders with a range of disciplinary measures for minor offenses to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15, as amended, would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings, while precluding punishment in the form of a diet consisting only of bread and water. Implementing rules would address several issues concerning the administration of non-judicial punishment under Article 15, including the standard of evidence at non-judicial punishment proceedings, the administrative consequences of non-judicial punishment for minor disciplinary offenses, and the circumstances qualifying for the "vessel exception."

TITLE IV—COURT-MARTIAL JURISDICTION

Section 401 contains amendments concerning courts-martial classifications under Article 16 of the UCMJ. Under current law, general courts-martial consist of a military judge and not less than five members in non-capital cases, or a military judge alone upon the election of the accused. Special courts-martial consist of not less than three members, a military judge and not less than three members, or a military judge alone upon the election of the accused. Because there is a variable number of members in each case, the number of votes required for a conviction under Article 52 can fluctuate from case to case without any guiding principle to ensure consistency. *See* Section 715, *infra* (discussing voting by the court-martial panel under Article 52). The proposed amendments seek to enhance military justice and improve the consistency of court-martial panel deliberations by establishing standard panel sizes: twelve members in capital general courts-martial, eight members in non-capital general courts-martial, and four members in special courts-martial. As amended, Article 16 would include references to Article 25a (addressing panel size in capital cases), Article 25(d) (addressing the initial detailing

of members by the convening authority), and Article 29 (addressing the impaneling of members and the impact of excusals on panel composition).

Article 16(c), as amended, would require a military judge to be detailed to all special courts-martial, reflecting current military practice and similar federal and state civilian practice. The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. Such a forum is common among civilian criminal jurisdictions. *See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses. As provided in the proposed amendments to Article 19, punishments at this forum could include confinement and forfeitures limited to no more than six months and would not include a punitive discharge. In addition, a military magistrate designated by the detailed military judge could preside when authorized under service regulations and with the consent of the parties. *See* Section 403, *infra*. Implementing provisions in the Manual for Courts-Martial would establish limits on the types of offenses that could be referred for trial at this forum.

Section 402 would make conforming changes to Article 18 of the UCMJ to align the statute with the revised descriptions of types of courts-martial under Article 16. The amendments also would modify Article 18 to specify the sexual offenses (currently listed by cross-reference to Article 56(b)(2)) over which general courts-martial have exclusive jurisdiction. This would accommodate the proposal under Section 801, *infra*, to repeal Article 56(b) following the enactment of sentencing parameters under Article 56(d).

Section 403 would amend Article 19 to align the statute with proposed changes in Article 16 regarding the composition of special courts-martial. *See* Section 401, *supra.*

Section 404 would amend Article 20 to clarify the status of the summary court-martial as a non-criminal forum. In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a summary court-martial does not constitute a criminal prosecution. Although a summary court-martial appropriately may result in administrative and personal consequences, it does not have the collateral consequences of a criminal conviction because it does not reflect a determination made by a judicial, criminal forum. The proposed amendment would clarify that, because of its non-judicial nature, a summary court-martial is not a "criminal prosecution," within the traditional due process understanding of a criminal prosecution (i.e., presided over by a judicial officer, and where the accused has a right to counsel) and that a finding of guilty at a summary court-martial does not constitute a "criminal conviction."

TITLE V—COMPOSITION OF COURTS-MARTIAL

Section 501 would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes.

Section 502 concerns the eligibility requirements for service on court-martial panels. The proposed amendments to Article 25 would expand the opportunity for service on a court-martial panel by permitting the detail of enlisted personnel as panel members without requiring a

specific request from the accused. As amended, Article 25 would contain the following provisions:

Article 25(c)(1) and (d)(1) would retain the statutory prohibition against detailing panel members junior in rank and grade to the accused, but the statutory prohibition against detailing enlisted panel members who are of the same unit as an enlisted accused would be eliminated. There is no such limitation on the detailing of officers from the same unit as the accused under current law. As such, current law provides an unnecessary distinction between enlisted members and officers. The amendments would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused. This change would enhance the convening authority's ability to draw from a large pool of highly qualified members, thereby expanding the opportunity for courts-martial to reflect the input of the high caliber enlisted personnel in the modern armed forces.

Article 25(c)(2) would retain the option for the accused to request a panel with at least one-third enlisted members. In addition, it would grant the accused the option to request an all-officer panel, which is the default panel composition under current practice. The Article 25(d)(2) member-selection criteria (age, education, training, experience, length of service, and judicial temperament) would be retained to ensure that court-martial panels continue to be composed of the most highly qualified, eligible personnel. The statute's implementing rules would include appropriate adjustments to address requests for panels that include all officers or at least one-third enlisted representation.

Article 25(d)(3) would require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29. *See* Section 506, *infra.*

Section 503 would amend Article 25a to establish a standard panel size of twelve members in capital cases, consistent with the standard size for juries in federal civilian capital trials. Under current law, panels in capital courts-martial are composed of a variable number of members no fewer than twelve, which means that the number of members can vary from case to case without any guiding principle to ensure consistency. Under the statute, as amended, in the event a case becomes non-capital as a result of developments after referral but prior to impanelment, the case would proceed in accordance with the membership requirements under Articles 16 and 29. If the case becomes non-capital after twelve members have been impaneled, it would proceed with twelve members subject to the excusal provisions in Articles 29.

Section 504 contains amendments to Article 26 pertaining to the detailing and qualifications of military judges, as follows:

Section 504(a) would amend Article 26(a) to conform to the proposed amendments to Article 16 and to reflect current practice in which a military judge is detailed to every general and special court-martial.

Section 504(b) would amend Article 26(b) to provide that the Judge Advocates General certify officers to be military judges who are most qualified to serve by virtue of meeting

statutory criteria and through an evaluation of their individual education, training, experience, and judicial temperament.

Section 504(c) would amend Article 26(c) to provide for Manual provisions concerning minimum tour lengths for military judges. Implementing rules would enable the Services to apply appropriate exceptions to the minimum tour lengths.

Section 504(d) would add a new subsection (f) to Article 26 to expressly authorize cross-service detailing of military judges. Although such detailing has been addressed in the Rules for Courts-Martial, these amendments would provide clear statutory authority for this practice.

Section 504(e) would further amend Article 26 by adding a new subsection (g) to codify the position of chief trial judge. Under implementing regulations, the chief judge could detail subordinate military judges to particular cases, and carry out additional duties as directed by the Judge Advocates General or as identified in the UCMJ, MCM, and service regulations.

The proposed amendments to Article 26 also would remove the phrase "or his designee" from Article 26 in the three instances where it occurs. This change would conform the statute to current practice under the UCMJ, in which the Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Section 505 would amend Article 27, which concerns the detailing of trial and defense counsel to courts-martial, prescribes minimum qualification requirements for counsel, and disqualifies persons who have acted as the investigating officer, military judge, or a court member from later acting as trial or defense counsel in the same case.

Section 505(1) would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated previously in the same case.

Section 505(2) would amend Article 27(b) to extend the qualification requirement to any assistant defense counsel detailed to a general court-martial.

Section 505(3) would amend Article 27(c)(1) by requiring any defense counsel or assistant defense counsel detailed to a special court-martial to be qualified under Article 27(b). Article 27(c)(2), as amended, would retain the authority for the Services to detail individuals such as law students preparing to become judge advocates to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial without a requirement for certification under Article 27(b), so long as such individuals are determined to be competent to perform such duties by the Judge Advocate General. These changes are consistent with current practice, applicable federal civilian practice, and with the proposed changes to Articles 16 and 26, which would require a military judge to preside at all special courts-marital.

Section 505(3) also would add a new subsection (d) to Article 27. The new provision would require, to the greatest extent practicable, in any capital case, at least one defense counsel shall be learned in the law applicable to capital cases, reflecting the standard applicable in capital cases tried in the Article III courts and before military commissions.

Section 506 contains amendments to Article 29 pertaining to the assembly, impaneling, and excusal of members, and the detailing of new court members and military judges. As amended, Article 29 would contain the following provisions:

Article 29(a) would clarify the function of assembly in general and special courts-martial with members, and the limited situations in which a member may be absent or excused after assembly of the court-martial.

Article 29(b)-(c) would require the military judge to impanel the number of members required under Articles 16 and 25a: twelve members in a capital case; eight members in a non-capital general court-martial; and four members in a special court-martial. The military judge would impanel any alternate members authorized by the convening authority in a specific case, and would then excuse any member who was detailed but not impaneled.

Article 29(d) would provide for the detail of new members if, as a result of excusals after the members have been impaneled, the membership on the panel is reduced below the following: twelve members in a capital general court-martial; six members in a non-capital general court-martial; and four members in a special court-martial. Because excusal of a member for good cause mid-trial is not a common occurrence, this provision should be used only in unusual situations. As under current law, the prohibition on further trial proceedings when the panel membership falls below the required number of members does not preclude sessions under Article 39.

Article 29(e) would address the detailing of a new military judge when the military judge is unable to proceed as a result of physical disability or otherwise.

Article 29(f) would establish the procedure for presenting the prior trial proceedings to the newly detailed members or judge. In addition to retaining the current procedure for reading a transcript of the prior proceedings, the amendment would permit the previously admitted evidence to be presented to the new members through play-back of a recording.

Section 507 would create a new section, Article 26a, which would set forth minimum qualifications under which the Judge Advocates General, in accordance with service regulations, could certify military magistrates who could preside over proceedings under Articles 19 and 30a when designated by the detailed military judge.

Under Article 26a(b), military magistrates also could be assigned to non-judicial duties if so authorized under regulations of the Secretary concerned. This provision recognizes that the services have programs through which qualified officers may be detailed to perform duties of a non-judicial nature—that is, duties that do not have to be performed by a military judge—such as issuing search authorizations or serving as a summary court-martial officer, preliminary hearing officer, or pretrial confinement review officer.

TITLE VI—PRE-TRIAL PROCEDURE

Section 601 would amend Article 30, which provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. By reorganizing Article 30 into three subsections and removing the requirement for commanders to take "immediate steps" to dispose of charges and specifications, the amendments would improve the functionality of the statute and better align the statute's provisions with current practice.

Section 602 would create a new section, Article 30a, to authorize military judges to preside over certain pretrial issues that arise prior to referral of charges in a case. The authority under this section would extend only to issues: (1) that would be subject to post-referral review by a military judge at a general or special court-martial; and (2) that are designated expressly by the President as eligible for pre-referral review under this section. To the extent identified by the President in implementing regulations, judicial proceedings under this section could include matters currently reviewed in post-referral proceedings, such as search authorizations; requests for mental competency evaluations, individual military counsel, depositions, and subpoenas; review of pretrial confinement determinations; and enforcing victims' rights in pretrial proceedings under Article 6b. The rules prescribed by the President would set forth the procedures military judges should use under this section, and would limit the available remedies to those expressly identified by the President. Any pre-referral judicial consideration of these select issues would occur after an appropriate authority had the opportunity to take action to resolve them.

Article 30a(c) would allow the detailed military judge to designate a military magistrate to preside over the proceeding. The statute would provide for the creation of regulations by which military judges could formally review a military magistrate's rulings on pretrial matters. In addition to acting on pretrial matters, military magistrates also could preside over special court-martial cases referred as judge-alone trials, as proposed in Article 19, with the parties' consent. *See* Section 403, *supra.*

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the

report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra.*

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46

and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.

Section 605 would amend Article 34, which concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The section would amend Article 34 to clarify ambiguities in the language of the current statute, to require judge advocate consultation before referral of charges to special courts-martial, and to expressly tie the staff judge advocate's pre-referral disposition recommendation in general courts-martial to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30. As amended, Article 34 would contain the following provisions:

Article 34(a) would replace and clarify the provisions concerning staff judge advocate advice before referral to general courts-martial currently contained in Article 34(a)-(b). Article 34(a)(2) would expressly tie the staff judge advocate's disposition recommendation to the "in the interest of justice and discipline" disposition standard under Article 30.

Article 34(b) would require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

Article 34(c) would allow formal corrections to the charges and specifications to be made before referral in both general and special courts-martial.

Article 34(d) would define "referral," in the context of Article 34, to mean "the order of the convening authority that charges and specifications against an accused be tried by a specified court-martial," consistent with current implementing regulations.

The changes to Article 34 are intended to solidify and enhance the decision-making partnership between judge advocates and court-martial convening authorities, ensuring that the

interests of justice and discipline are well-considered and appropriately balanced in each individual case. Implementing regulations will address additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction, and with respect to those matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. Implementing regulations also would address the baseline requirements for pre-referral judge advocate consultation on relevant legal issues in special courts-martial.

Section 606 would amend Article 35, which requires the trial counsel to ensure that a copy of the charges and specifications is served upon the accused following referral of charges. Article 35 also provides the accused with the opportunity, in time of peace, to object to the commencement of trial until the completion of a statutory period following service of charges—three days for special courts-martial, and five days for general courts-martial. These requirements, consistent with similar procedural requirements in federal district court, would ensure that military accused receive sufficient notice of the charges upon which they are to be tried by court-martial, and sufficient time to prepare for trial with their defense counsel. The present statute contains ambiguities with respect to each of these statutory requirements. The proposed revision would address these ambiguities and make other clarifying and conforming changes, none of which alter the purposes of Article 35.

TITLE VII—TRIAL PROCEDURE

Section 701 would amend Article 38 to conform it to the proposed amendments in Article 27 concerning the requirement for all defense counsel in general and special courts-martial to be qualified under Article 27(b).

Section 702 would amend Article 39 to codify current practice, in which military judges preside at arraignments. The amendments also would conform the statute to the proposed amendments to Articles 16, 19, and 53 requiring military judges to be detailed to preside over and to sentence the accused in all non-capital general courts-martial and all special courts-martial.

Section 703 would make a technical amendment to Article 40 to clarify that "a summary court-martial" is the narrow exception to the general rule that the authority to grant continuances is vested solely in the military judge, with no substantive change to the law. This change would conform the statute to the proposed amendments to Articles 16 and 19 requiring military judges to be detailed to preside over all general and special courts-martial, and would better align military practice regarding continuances with federal civilian practice.

Section 704 would amend Article 41 to conform the statute to the changes proposed in Article 16 concerning standard panel sizes in general and special courts-martial and the elimination of special courts-martial without a military judge. The statute's implementing rules would address application of the "liberal grant mandate" with respect to "for cause" challenges by each party in a general or special court-martial. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

Section 705 contains amendments to Article 43 pertaining to the statute of limitations for certain UCMJ offenses. The statute would be amended as follows:

Section 705(a) would extend the statute of limitations applicable to child abuse offenses under Article 43 from the current five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer, thereby aligning Article 43(b)(2)(A) with 18 U.S.C. § 3283 (Offenses against children).

Section 705(b) would create a new subsection (h), extending the statute of limitations for Article 83 (fraudulent enlistment) cases from five years, as it currently stands, to (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Section 705(c) would create a new subsection (i), extending the statute of limitations until a period of time following the implication of an identified person by DNA testing that is equal to the otherwise applicable limitations period.

Section 705(d) contains conforming amendments based on the proposed realignment of the punitive articles.

Section 705(e) establishes the applicability of the amendments made by subsections (a), (b), (c), and (d) to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitations period has not yet expired.

Section 706 would amend Article 44 (Former jeopardy) to align the military more closely with federal civilian standards concerning double jeopardy.

Section 707 contains amendments to Article 45 concerning the pleas of the accused.

Section 707(a) would amend Article 45(b) to permit an accused to plead guilty in a capital case when the death penalty is not a mandatorily prescribed punishment. It would further amend the statute to conform to the proposed changes in Articles 16 and 19 to require a military judge to be detailed to all general and special courts-martial, and to eliminate the unnecessary requirement under current law for members to enter a finding of guilty where the military judge has already accepted the accused's guilty plea.

Section 707(b) would codify a harmless error rule in a new subsection (c) of Article 45. The proposed language is adapted from Fed. R. Crim. P. 11(h), using the language of Article 59(a) by substituting the phrase "materially prejudice the substantial rights of the accused" for the phrase "affects" substantial rights. *See* Article 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (describing Article 59(a) as the military counterpart to Fed. R. Crim. P. 52(a)). These changes would reflect federal practice and procedure with respect to harmless error and plain error review, while recognizing the unique aspects of military practice.

The proposed amendments to Article 45 aim to improve the efficiency and effectiveness of appellate review of unconditional guilty pleas, while also preserving the unique procedural protections in the military system to ensure a guilty plea is voluntary, knowing, and intelligent. The amendments fit within the larger goal of encouraging error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a). The changes seek to eliminate the sanction of reversal for harmless errors, and would conform the statute to the proposed changes in Article 66 (replacing automatic review in non-capital cases with review based upon the accused's right to file an appeal). Subsection (c) addresses only harmless error. Implementing rules will prescribe plain error review for matters not properly preserved at trial. The addition of subsection (c) reflects the specific structure of Article 45, and is not intended to disturb the longstanding application of standards of review, including a harmless error test, to other aspects of the Code that are not accompanied by a statutory standard of review.

Section 708 contains several amendments to Article 46 pertaining to the opportunity to obtain witnesses and other evidence and the use of subpoenas and other process for courts-martial and for investigative purposes. Currently, Article 46 states only that process issued in "court-martial cases" for witnesses and evidence shall be similar to process issued in federal district court, with no explicit subpoena authority provided, and with no distinction made between different types of proceedings under the UCMJ and the different authorities for subpoenaing witnesses and evidence at different stages in the court-martial process. The proposed changes would maintain and enhance the core features of Article 46, while strengthening the relationships among related provisions in Articles 46, 47, and 49.

Section 708(a) would revise Article 46 as follows:

Article 46(a) would be amended to clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial.

The limitations and conditions on defense counsel interviews of victims of sex-related offenses currently in Article 46(b) would be moved to Article 6b and expanded to cover all crime victims, consistent with related victims' rights provisions under that statute.

Article 46(b) would restate the current provisions of Article 46(c).

Article 46(c) would clarify current law concerning the issuance of subpoenas or other process to compel witnesses to appear and testify before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49.

Article 46(d) would provide for subpoenas to compel the production of evidence before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49. It would also include an additional paragraph providing authority to issue subpoenas duces tecum for investigations of offenses under the UCMJ, if authorized by a general court-martial convening authority. This provision would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice, and would replace the provision currently contained in Article 47(a)(1) concerning the issuance of

subpoenas duces tecum for Article 32 preliminary hearings. In addition, Article 46(d) would authorize military judges to issue warrants or court orders for information pertaining to stored electronic communications in the same manner as U.S. district court judges under the Stored Communications Act (Chapter 121, Title 18) subject to limitations prescribed by the President. This new provision would ensure military criminal investigative organizations and military prosecutors have access to electronic evidence during the investigative stages of court-martial cases, similar to their federal counterparts, and under the same limitations and conditions applicable in federal district court.

Article 46(e) would add a new subsection to provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges.

Section 708(b) would make conforming amendments to 18 U.S.C. §§ 2703 and 2711(3) to include process issued in court-martial proceedings.

Section 709 contains amendments to Article 47, which provides for criminal prosecution in U.S. district court of civilians who fail to comply with military subpoenas issued under Article 46. The amendments would retain current law under Article 47(a), while updating and clarifying the statute's provisions and the relationship between Articles 46 and 47.

Section 710 would amend Article 48, which provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other proceedings under the UCMJ. In 2011, Congress made significant amendments to Article 48 that provided a more direct means for military judges to enforce court orders and military subpoenas, and better aligned the contempt authority and procedures in military courts with those in federal district courts. However, the language of the statute as amended is ambiguous with respect to the contempt power of judges serving on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals.

Section 710(a) would clarify the recent amendments to Article 48 by defining the judicial officers who may exercise the contempt authority to include judges of the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals; military judges detailed to courts-martial, provost courts, military commissions, or any other proceeding under the UCMJ (including the proposed Article 30a proceedings); military magistrates designated under Articles 19 or 30a; commissioned officers detailed as summary courts-martial; and presidents of courts of inquiry.

Section 710(b) would transfer the review function for contempt punishments issued by military and appellate judges from the convening authority to the appropriate appellate court. This change would strengthen the contempt power and would ensure that persons held in contempt of court by military judges and appellate judges—particularly civilian attorneys and witnesses—are afforded a fair appellate review process, comparable to the review process applicable in civilian criminal courts and appellate courts across the country. The convening authority's review function would be retained for contempt punishments issued by summary courts-martial and courts of inquiry.

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended, subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Section 712 would amend Article 50 to update the statute to permit sworn testimony from a court of inquiry to be played from an audiovisual recording if the deposed witness is unavailable at trial and the evidence is otherwise admissible under the rules of evidence.

Section 713 would amend Article 50a to conform the statute to the proposed changes in Article 16 to eliminate special courts-martial without a military judge.

Section 714 would amend Article 51, which concerns voting by members of a court-martial and rulings by military judges. These amendments would remove statutory references to courts-martial without a military judge, reflecting the proposed amendments to Article 16 to require the detailing of a military judge in all general and special courts-martial. The amendments would retain current law and procedures for voting on the findings and sentence, and for rulings by the military judge, other than those aspects of Article 51 and the implementing rules which specifically concern courts-martial without a detailed military judge.

Section 715 would amend Article 52 concerning the number of votes required for the findings in members cases, and for the findings and sentence in capital cases. Under current law, because the requirement for a two-thirds vote on the findings (and on most sentences) in Article 52 establishes a floor, not a fixed requirement, none of the parties or the public knows at the outset of a court-martial how many votes will be required for a conviction. The percentage required for a conviction and for a specific sentence can be affected significantly by the number of members detailed to a court-martial and the number of members removed through excusal, challenges for cause, and peremptory challenges. As a result, it is not unusual to see variations in voting requirements ranging from 67 percent to 80 percent of the members of the court-martial panel. The proposed amendments, in conjunction with the proposal for standard panel sizes under Article 16, would standardize the voting requirement in each type of court-martial at three-fourths (75 percent) in non-capital members cases, and unanimous on the findings and the sentence in capital cases. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53 with respect to capital cases and judge-alone sentencing. Implementing rules would address the procedures concerning voting on sentences of death, life without the possibility of parole, and other lawful sentences.

Section 716 would amend Article 53 to provide for judicial sentencing in all general and special courts-martial. This change would better align military sentencing practice with federal civilian sentencing practice, as well as the practice in the majority of state jurisdictions. Judicial sentencing would create the opportunity for greater uniformity and consistency in court-martial sentences, enhanced efficiency and cost-savings, and would facilitate further reforms in military sentencing practices and procedures.

Article 53(c), as amended, would provide that, for capital offenses, members will determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge. The military judge would sentence the accused in accordance with the determination of the members, including to other lesser punishments in accordance with regulations prescribed by the President.

Implementing rules would address procedures for sentencing proceedings and sentence determination in the context of judge-alone sentencing, including with respect to: releasing the members, subject to recall, after the findings are announced in a non-capital case; the admissibility of sentencing information offered by the parties and the grounds for objection to such information; the rights of victims to participate in sentencing proceedings; the use of victim impact statements during sentencing; the duties of trial and defense counsel before and during the proceeding; the rules and factors to guide military judges in their sentence determinations

(similar to 18 U.S.C. § 3553(a)); and rules pertaining to appellate review of military judge sentence determinations and findings.

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Section 718 would amend Article 54, which provides the basic rules and procedures for producing, authenticating, and distributing records of proceedings in general, special, and summary courts-martial. The amendments would facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records. The use of this technology would streamline preparation and distribution of the record of trial in light of recent amendments that reduce or eliminate post-trial proceedings under Article 60. In addition, the proposed amendments would increase the availability of court-martial records to victims of crime.

The amendments to Article 54 would: (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.

Changes in the rules implementing Article 54 would address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts. Implementing rules also would address the rules for providing a "complete" record of trial, including the circumstances under which a written transcript will be prepared and the procedures

for preparing a written transcript. In the near term, the statute's implementing rules would provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript. Implementing rules also would address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

TITLE VIII—SENTENCES

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra.* The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra*. Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to

approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra.*

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the

parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra.*

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps,

and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Section 802(a) would consolidate Articles 57, 57a, and 71 into Article 57 (Effective date of sentences) to address in a single article the effective date for all punishments that could be adjudged at a court-martial. Article 57, as amended, would contain the following provisions:

Article 57(a) would establish when the punishment adjudged at a court-martial sentence becomes effective. The proposed subsection combines portions of Articles 57, 57a, and 71, and removes the distinction between when a sentence becomes effective and when it is ordered executed. With the exception of death and punitive discharges, sentences would be effective by operation of law without any additional approval upon entry of judgment. This is a conforming

change to the proposed changes in Article 60 (Post-trial processing in general and special courts-martial) and the proposed enactment of Articles 60a (Limited authority to act on sentence in specified post-trial circumstances), 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial), and 60c (Entry of judgment).

Article 57(a)(1) would address when forfeitures and reduction become effective. The first sentence of this paragraph is taken without modification from Article 57(a)(3). The remainder of this paragraph is taken from Article 57(a)(1).

Article 57(a)(2) is taken, without change, from Article 57(b). Article 57(b) would be modified to apply only to summary courts-martial.

Article 57(a)(3) is taken, without change, from Article 71(a).

Article 57(a)(4) is taken, without change, from Article 71(b).

Article 57(a)(5) is taken from Article 71(c)(1) with modification. The provisions of Article 71(c)(1) regarding waiver or withdrawal of an appeal and the definition of what constitutes a final appeal are consolidated in subsection (c).

Article 57(a)(6) is taken from Article 57(c) with modification. As a conforming change to the proposal for Article 60c, in general and special courts-martial "entry of judgment" is substituted for "on the date ordered executed." *See* Section 904, *infra*. For consistency, a summary court-martial sentence would become effective when approved by the convening authority.

Article 57(b)(1) is a combination of Article 57(a)(2), authorizing the deferment of forfeitures and reduction, and Article 57a(a), authorizing the deferment of confinement. The definition of convening authority is taken from Article 57a(a). As a conforming change to the proposal for Article 60c, the deferment of a sentence would terminate upon entry of judgment.

Article 57(b)(2)-(4) are taken from Article 57a(b)(1)-(3), with no substantive changes.

Article 57(b)(5) is taken from Article 57a(c) with conforming changes to reflect the proposed new section, Article 60c (Entry of judgment). *See* Section 904, *infra.*

Article 57(c)(1) is taken from Article 71(c)(1)-(2) with modification to reflect the proposal for an appeal of right. Under the revised language, appellate review would be complete when an Article 65 review is finished, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. Paragraph (2) incorporates the current provision in Article 71(c)(1) that the completion of appellate review is a final determination on the legality of the proceedings.

Section 802(b) contains conforming amendments to strike Articles 57a and 71 and an additional conforming amendment to Article 58b.

Section 803 would amend Article 58a (Sentences: reduction in enlisted grade upon approval), which provides a mechanism for the individual services to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial includes a punitive discharge, confinement, or hard labor without confinement. The amendments would conform the statute to the changes proposed in post-trial procedure under Article 60 and the proposed Article 60c (Entry of judgment). *See* Section 904, *infra.*

Section 804 would sunset Article 58a after the enactment of sentencing parameters and criteria under Article 56. This sunset provision is consistent with the proposals for judge-alone sentencing under Article 53 and for sentencing parameters and criteria under Article 56. *See* Sections 716 and 801, *supra.* The sentencing parameters and criteria proposed in Section 801 would include objective factors for the military judge to consider in determining whether a sentence should include a reduction in pay grade.

TITLE IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

Sections 901-904 concern post-trial processing and post-trial action by the convening authority. These processes are currently prescribed under Article 60 (Action by the convening authority). These sections would amend Article 60 of the UCMJ in its entirety.

Section 901 would amend Article 60 to provide for the distribution of the trial results and to authorize the filing of post-trial motions with the military judge in general and special courts-martial. The convening authority's role in post-trial processing would be moved to new Articles 60a and 60b. *See* Sections 902-903, *infra.* Article 60, as amended, would include the following provisions:

Article 60(a) would require the military judge to immediately enter into the record the Statement of Trial Results, consisting of the pleas of the accused, the findings and sentence of the court-martial, and any other information required by the President. The statute would require that copies be provided to the convening authority, the accused, and any victim of any offense. The statement of trial results would serve as the basis for the entry of judgment under Article 60c.

Article 60(b) would require the President to establish rules governing submission of post-trial motions to the military judge. The implementing rules would establish filing deadlines for the parties and provide explicit authority for the military judge and convening authority to direct post-trial hearings when necessary to address allegations of legal error. The authority to order post-trial hearings would replace the previous authority to order proceedings in revision. *See* Article 60(f)(1)-(2).

Section 902 would create a new section, Article 60a (Limited authority to act on sentence in specified post-trial circumstances), which would retain current limitations on the convening authority's post-trial actions in most general and special courts-martial, subject to a narrowly limited suspension authority under Article 60a(c) and a revised authority related to substantial assistance under Article 60a(d). Article 60a, as proposed, would contain the following provisions:

Article 60a(a)-(b) would retain and clarify existing limitations on the convening authority's post-trial actions in general and special courts-martial in which: (1) the maximum sentence of confinement for any offense is more than two years; (2) adjudged confinement exceeds six months; (3) the sentence includes dismissal or discharge; or (4) the accused is found guilty of designated sex-related offenses. Under current law, the convening authority in such cases is prohibited from modifying the findings of the court-martial, or reducing, commuting, or suspending a punishment of death, confinement of more than six months, or a punitive discharge.

Article 60a(c) would provide a limited suspension authority in specified circumstances. For the convening authority to exercise this authority, the military judge would be required to make a specific suspension recommendation in the Statement of Trial Results. The suspension authority under subsection (c) would be limited to punishments of confinement in excess of six months and punitive discharges.

Article 60a(d) would retain, with clarifying amendments, the key features of current law with respect to the convening authority's power to reduce the sentence of an accused who assists in the prosecution or investigation of another person. As amended, the President may prescribe rules providing for a convening authority to exercise this power after entry of judgment. This provision is designed to allow for the reduction of a sentence of an accused who provides substantial assistance in the prosecution of another person, even well after his own trial is over and appellate review is complete. The implementing rules will be modeled on Fed. R. Crim. P. 35(b).

Article 60a(e) would allow the accused and a victim of the offense to submit matters to the convening authority for consideration. The implementing rules would establish the timelines for submitting matters under this subsection and procedures for responding to submissions. The implementing rules also would require the accused and victim to have a copy or access to the recording of the open sessions of the court-martial and admitted unsealed exhibits.

Article 60a(f) would require the decision of the convening authority to be forwarded to the military judge. If the convening authority modified the sentence of the court-martial, the convening authority would be required to explain the reasons for the modification. An explanation for the convening authority's decision would only be required when the convening authority modifies the sentence. No approval of the findings or sentence would be required. The decision of the convening authority would be forwarded to the military judge, who would incorporate any change in the sentence into the entry of judgment. In a case where the accused provides substantial assistance under subsection (d) and a designated convening authority reduces the sentence of the accused after entry of judgment, the convening authority's action would be forwarded to the chief trial judge, who would be responsible for ensuring appropriate modification of the entry of judgment. Because a modification might happen during or after the completion of appellate review, the modified entry of judgment would be forwarded to the Judge Advocate General for appropriate action.

Section 903 would create a new section, Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial). The new section would retain and clarify

the convening authority's post-trial authorities and responsibilities with respect to the findings and sentence of a court-martial not covered by subsection (a)(2) of new Article 60a. This post-trial authority would be available in summary courts-martial and a limited number of general and special courts-martial which, because of the offenses charged and the sentence adjudged, would not be covered under Article 60a. Consistent with existing law, the convening authority in such cases would be authorized to act on the findings and the sentence, and could order rehearings, subject to certain limitations. The procedural requirements under Article 60b, to include consideration of matters submitted by the accused and victim, would be the same as those provided in Article 60a. In summary courts-martial, the convening authority would be required to act on the sentence, and would have discretion to act on the findings, as under current law.

Section 904 would create a new section, Article 60c (Entry of judgment). The entry of judgment would require the military judge to enter the judgment of the court-martial into the record in all general and special courts-martial, and would mark the conclusion of trial proceedings. The judgment would reflect the Statement of Trial Results, any action by the convening authority on the findings or sentence, and any post-trial rulings by the military judge. The judgment also would indicate the time when the accused's case becomes eligible for direct appeal to a Court of Criminal Appeals under Article 66, or for review by the Judge Advocate General under Article 65. This requirement for an entry of judgment is modeled after Fed. R. Crim. P. 32(k). The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under Article 60b, would constitute the judgment of the court-martial.

Section 905 would amend Article 61, which provides that an accused may file a statement with the convening authority expressly waiving the right to appellate review under Article 66 or Article 69. The amendments would conform the statute to the changes proposed in Articles 60, 65, and 69 concerning post-trial processing. *See* Sections 901-904, *supra*; Sections 909, 913, *infra*.

Section 906 concerns government interlocutory appeals. Presently, Article 62 provides a limited basis for government interlocutory appeals. This section would amend Article 62 to better align interlocutory appeals in the military with federal civilian practice, by authorizing an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence. Additionally, the amendments would better align Article 62 with the rule of construction applicable to 18 U.S.C. § 3731, by directing military courts to liberally construe the statute's provisions to effect its purposes. As amended, the authority for interlocutory appeals under Article 62 would be extended to all general and special courts-martial, which would replace the current limitation authorizing such appeals only if the offense at issue carries the potential for a punitive discharge.

Section 907 would amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes his or her plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) a sentence is set aside based on a government appeal. The amendments would better align military practice with federal civilian practice in the area of rehearings.

Section 908 concerns review of court-martial cases not otherwise subject to appellate review under Article 66 or review by the Office of the Judge Advocate General under Article 69. Under current law, Article 64 provides for judge advocate review of such cases, including conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This section would amend Article 64 to apply only to the initial review of summary courts-martial. Article 65, as amended, would provide for review of general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals. No substantive changes to the procedures or scope of review of summary courts-martial would be made. Implementing rules will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

Section 909 would amend Article 65 to conform the statute to the changes proposed in Articles 66 and 69. *See* Sections 910, 914, *infra*. As amended, Article 65 would: (1) provide additional guidance on the disposition of records; (2) require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66; and (3) provide for appellate review of all cases that are not subject to direct appellate review by a Court of Criminal Appeals, similar to the current review under Article 64. As amended, Article 65 would contain the following provisions:

Article 65(a) would require the record of trial in all general and special courts-martial in which there is a finding of guilty to be transmitted to the Office of the Judge Advocate General. In all other cases, the records of trial would be transmitted and disposed of in accordance with service regulations.

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

Article 65(c) would require the Judge Advocate General to provide a "Notice of the Right to Appeal" to an accused eligible to file an appeal under Article 66(b)(1).

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed

and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra.*

Article 65(e) would provide that, if the attorney conducting the review under subsection (d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part. If the Judge Advocate General sets aside the findings or sentence, he or she would be required to either order a rehearing or dismiss the charges. In addition, where the Judge Advocate General sets aside the findings or sentence and orders a rehearing, if the convening authority determines that a rehearing would be impractical, the convening authority should dismiss the charges.

Under the related proposal for Article 64, summary courts-martial would still be reviewed under the procedures contained in that statute. General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra.* Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Section 910 would amend Article 66 to revise the scope of review and enlarge the category of cases eligible for review by the Courts of Criminal Appeals under Article 66. Specifically, the proposed amendments would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) provide for discretionary review by the Courts of Criminal Appeals in cases that are not eligible for an appeal as of right; (4) provide standards of review for appeals; and (5) codify the authority of Courts of Criminal Appeals to remand cases and order rehearings. As amended, Article 66 would contain the following provisions:

Article 66(a) would require the President to establish minimum tour lengths, with appropriate exceptions, for appellate military judges, and would require the Judge Advocate General of each service to certify the qualifications of appellate military judges consistent with the proposed amendment to Article 26 regarding the assignment and qualifications of military judges. *See* Section 504(b), *supra.* Implementing rules will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

Article 66(b) would expand the categories of cases in which servicemembers may seek direct review by the Courts of Criminal Appeals. It would replace automatic review in non-capital cases with an appeal of right. It also would continue to require automatic review of all capital

cases. The amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record. As amended, there would be two prerequisites for review of non-capital cases by the Courts of Criminal Appeals under Article 66(b): (1) entry of the court-martial judgment into the record by a military judge under proposed Article 60c; and (2) timely filing of an appeal. The Court of Criminal Appeals would be able to review: (1) any case with a sentence to a punitive separation or confinement of more than six months; (2) any case that was previously the subject of an appeal by the United States under Article 62 or Article 56; and (3) any other case in which an application for discretionary review under Article 69(e)(2) was granted. For purposes of this subsection, the term "confinement for more than six months" would mean the total period of confinement adjudged, but would not aggregate periods of confinement running concurrently.

Article 66(c) prescribes jurisdictional timelines for appellate review by the Courts of Criminal Appeals.

Article 66(d) defines the duties of the Courts of Criminal Appeals, which would be consistent with current practice except that the obligation to review every case for factual sufficiency and sentence appropriateness would be eliminated. Under paragraph (3), the Courts of Criminal Appeals could provide relief for post-trial errors and excessive post-trial delay.

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if "clearly convinced that the finding was against the weight of the evidence." This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court's authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

Article 66(f) would provide standards of review applicable to sentences adjudged both before and after sentencing parameters are implemented under the proposed amendments to Article 56. *See* Section 801, *supra.* The proposed standards of review would provide the accused with several avenues to appeal a court-martial sentence. First, the accused would be able to appeal a sentence that was unlawful, or that resulted from incorrect application of a sentencing parameter. Second, consistent with the government's ability to appeal a sentence under Article 56(e) (as amended) the accused could appeal a sentence on the grounds that it is plainly unreasonable. *See* Section 801, *supra.* The term "plainly unreasonable" is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge. Third, in cases where an adjudged offense has no sentencing parameter, or where the sentence imposed was above the applicable

sentencing parameter for the offense, the accused would be able to appeal the sentence as inappropriately severe. This provision recognizes that a sentence may be "inappropriately severe" despite being reasonable. Finally, in the case of a sentence determined by a panel in a capital case, consistent with current practice, the Court would be required to determine whether the sentence is appropriate.

Article 66(g)(3) would codify the authority of Courts of Criminal Appeals to remand a case for additional proceedings as may be necessary to address substantial issues. This authority would be subject to any limitations the Court may direct or the President may prescribe by regulation. This provision would codify current practice (i.e., *DuBay* Hearings). *See United States v. Dubay*, 37 C.M.R. 411 (1967).

In addition to the authority to review specific types of cases designated in Article 66, the Courts of Criminal Appeals consider interlocutory appeals under Article 62 and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.*, *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Denedo*, 556 U.S. 904 (2009). The Courts of Criminal Appeals also review cases sent to the Court by the Judge Advocate General under Article 69. Under the proposed amendments to Article 56, the Courts of Criminal Appeals also would review sentence appeals filed by the Government under Article 56(e). The procedures applicable to proceedings arising under Article 56, like the procedures applicable to proceedings arising under Article 62, Article 69, and the All Writs Act, may be set forth in the rules for the Courts of Criminal Appeals prescribed under Article 66.

Section 911 would amend Article 67, which sets forth the procedures for the Court of Appeals for the Armed Forces to review cases from the Courts of Criminal Appeals, to conform the statute to proposed changes in Articles 60 and 66, including the creation of an "entry of judgment" in the proposed Article 60c (Entry of judgment). *See* Sections 901-904, 910, *supra.* In addition, the amendments would provide for notification by a Judge Advocate General to the other Judge Advocates General prior to certifying a case for review by the Court of Appeals for the Armed Forces. The recommendation for "appropriate notification to the other Judge Advocates General" would apply only to cases the Judge Advocate General intends to certify to the Court of Appeals for the Armed Forces pursuant to Article 67(a)(2). This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.

Section 912 would make a technical amendment in Article 67a.

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three

years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. *See* Section 916, *supra.* A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Section 914 would amend Article 70 to require, to the greatest extent practicable, at least one appellate defense counsel shall be learned in the law applicable to capital cases in any case in which the death penalty was adjudged at trial. This change would provide the accused with the same access to an expert in death penalty litigation that is currently provided to defendants in Article III courts and before military commissions under Chapter 47a of Title 10.

Section 915 would amend Article 72, which establishes the process for vacating a suspended court-martial sentence. The amendments would authorize a special court-martial convening authority to detail a judge advocate qualified under Article 27(b) to preside at the vacation hearing, which must be held before a suspended sentence can be vacated. The detailed judge advocate would replace the special court-martial convening authority at the hearing and would make factual determinations about whether a violation occurred. Under current law, the procedures applicable at vacation hearings under Article 72 are prescribed by cross-reference to R.C.M. 405, which provides the rules and procedures applicable at Article 32 hearings. The recent changes to Article 32 (Preliminary hearing) and R.C.M. 405 no longer provide a hearing structure that can be used in vacation proceedings. The implementing rules for Article 72 will be updated to reflect this change and to provide procedures applicable at vacation hearings.

Section 916 would amend Article 73 to conform the statute to the proposed changes in Article 60 and to increase the time period for an accused to petition for a new trial from two years to three years, consistent with the three-year period in Fed. R. Crim. P. 33(b)(1).

Section 917 would amend Article 75, which provides the basic rules and procedures for the restoration of a member's rights, privileges, and property when a court-martial conviction is set aside during review. As amended, the statute would authorize the President to establish regulations governing when an accused may receive pay and allowances while pending a rehearing. The implementing rules will set forth the authority to provide pay and allowances to an accused who is pending a rehearing, performing duties, and not in confinement.

Section 918 would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening authority) and the proposed new Article 60c (Entry of judgment), with no substantive changes. Article 76a currently authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

TITLE X—PUNITIVE ARTICLES

Section 1001 would reorganize the punitive articles by transferring and redesignating 16 articles within Subchapter X of the UCMJ. In the context of the substantive changes in various punitive articles proposed in Title X of the bill, the reorganization of articles listed in section 1001 would serve to more closely group related offenses. The substantive amendments to the punitive articles, including the articles reorganized under Section 1001, are set forth in Sections 1002-1051.

Section 1001(1) would transfer and redesignate Articles 83 (Fraudulent enlistment, appointment, or separation) and 84 (Unlawful enlistment, appointment, or separation) as Articles 104a and 104b, respectively.

Section 1001(2) would transfer and redesignate Article 95 (Resistance, flight, breach of arrest, and escape) as Article 87a.

Section 1001(3) would transfer and redesignate Article 98 (Noncompliance with procedural rules) as Article 131f.

Section 1001(4) would transfer and redesignate Article 103 (Captured or abandoned property) as Article 108a.

Section 1001(5) would transfer and redesignate Article 104 (Aiding the enemy) as Article 103b.

Section 1001(6) would transfer and redesignate Article 105 (Misconduct as prisoner) as Article 98.

Section 1001(7) would transfer and redesignate Articles 106 (Spies) and 106a (Espionage) as Articles 103 and 103a, respectively.

Section 1001(8) would transfer and redesignate Article 113 (Misbehavior of sentinel) as Article 95.

Section 1001(9) would transfer and redesignate Article 111 (Drunken or reckless operation of a vehicle, aircraft, or vessel) as Article 113.

Section 1001(10) would transfer and incorporate Article 130 (Housebreaking) as part of the amended Article 129a.

Section 1001(11) would transfer and redesignate Article 120a (Stalking) as Article 130.

Section 1001(12) would transfer and redesignate Article 123 (Forgery) as Article 105.

Section 1001(13) would transfer and redesignate Article 124 (Maiming) as Article 128a.

Section 1001(14) would transfer and redesignate Article 132 (Frauds against the United States) as Article 124.

Section 1002 would amend Article 79 and retitle the statute as "Conviction of offense charged, lesser included offenses, and attempts." As amended, Article 79 would authorize the President to designate an authoritative, but non-exhaustive, list of lesser included offenses for each punitive article of the UCMJ in addition to judicially determined lesser included offenses. This change would provide actual notice of applicable lesser included offenses to all parties. Implementing provisions will provide the President with the flexibility to designate factually similar offenses as lesser included offenses under a "reasonably included" standard. The "reasonably included" standard would enhance actual notice by requiring a measurable relationship between the greater offense and the listed offense.

Presidentially designated lesser included offenses under Article 79 and the implementing provisions and judicially determined lesser included offenses would work in concert at trial. The statute's implementing provisions would explain to practitioners that potential lesser included offenses may be established at trial either by: (1) designation by the President; or (2) by the military judge at trial when the military judge determines that an offense raised by the evidence at trial is "necessarily included within the greater offense."

Section 1003 would amend Article 82 and retitle the statute as "Soliciting commission of offenses." The amendments would migrate the general solicitation offense under Article 134 into Article 82, as a separate subsection before the specific solicitation offenses in the existing statute. The general solicitation offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. Implementing provisions will maintain the same punishments for all solicitation offenses as under current law.

Section 1004 would transfer and redesignate Article 115 (Malingering) as Article 83, and would make a technical change to the statute's provisions. The technical change would replace the words "for the purpose of avoiding" with the words "with the intent to avoid" to better address the mens rea required for the offense.

Section 1005 would migrate the offense of "Quarantine: medical, breaking" from Article 134, the General article, to redesignated Article 84 (Breach of medical quarantine). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1006 would consolidate the offenses of "Missing movement" in existing Article 87 and "Jumping from vessel into the water" in Article 134 (the General article) into a single offense under Article 87 (Missing movement; jumping from vessel). The consolidated offense would prohibit servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move or jumping from a vessel into the water. These offenses are well-recognized concepts in military criminal law. Accordingly, they do not

need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1007 would migrate and consolidate the offenses of "Restriction, breaking" and Correctional custody – offenses against" from Article 134 (the General article) to a new section, Article 87b (Offenses against correctional custody and restriction). These offenses are well-recognized concepts in criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1008 would amend Article 89 and retitle the statute as "Disrespect toward superior commissioned officer; assault of superior commissioned officer." As amended, Article 89 would include the offense of "Assaulting a superior commissioned officer," which would be transferred from Article 90. This change would align these closely related provisions in Articles 89.

Section 1009 would amend Article 90 by transferring the offense of "Assaulting a superior commissioned officer" to Article 89 and retitling the statute as "Willfully disobeying superior commissioned officer." This change would realign closely related provisions in Articles 89 and focus the Article as amended on the willful disobedience of a lawful command of a superior commissioned officer.

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term "officer" as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term "applicant for military service" would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a "prohibited sexual activity" under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

Section 1011 would migrate the loitering portion of the offense of "Sentinel or lookout: offenses against or by" from Article 134 (the General article) to the redesignated Article 95 (Offenses by sentinel or lookout). The wrongfulness of loitering by a sentinel or lookout is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1012 would create a new section, Article 95a (Disrespect toward a sentinel or lookout). The new statute would include the disrespect portion of the offense of "Sentinel or lookout: offenses against or by," which would be migrated from Article 134 (the General article). The offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1013 would amend Article 96 and retitle the statute as "Release of prisoner without authority; drinking with prisoner." As amended, Article 96 would include the offense of "Drinking liquor with prisoner," which would be migrated from Article 134 (the General article). The latter offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1014 would amend Article 103 (Spies), as transferred and redesignated by Section 1001(7), *supra*, by replacing the mandatory death penalty currently required with a discretionary death penalty similar to that authorized under existing Article 106a (Espionage) and for all other capital offenses under the Code.

Section 1015 would migrate the offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" from Article 134 (the General article) to redesignated Article 104 (Public records offenses). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1016 would create a new section, Article 105a (False or unauthorized pass offenses). The new statute would include the offense of "False or unauthorized pass offenses," which would be migrated from Article 134 (the General article). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1017 would migrate the offense of "Impersonating a commissioned, warrant, noncommissioned, petty officer or agent of official" from Article 134 (the General article) into the redesignated Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). The term "officer" as used in subsection (a)(1) of the statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the

"terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1018 would create a new section, Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button), and would migrate the offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button" from Article 134 (the General article) into the new statute. When committed by servicemembers, the offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon proof of the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1019 would amend Article 107 and retitle the statute as "False official statements; false swearing." As amended, Article 107 would include the offense of "False swearing," which would be migrated from Article 134 (the General article). The offense of false swearing is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1020 would create a new section, Article 107a (Parole violation), and would migrate the offense of "Parole, Violation of" from Article 134 (the General article) into the new statute. This offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1021 would create a new section, Article 109a (Mail matter: wrongful taking, opening, etc.), and would migrate the offense of "Mail: taking, opening, secreting, destroying, or stealing" from Article 134 (the General article) into the new statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1022 would amend Article 110 (Improper hazarding of vessel) to also prohibit improper hazarding of an aircraft. Although other punitive articles, such as Article 92 (dereliction of duty) and Article 108 (destruction of military property) may speak to the loss or destruction of government property generally, no punitive article captures the act of improper hazarding of an aircraft, considering the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States. This amendment would align the conduct involving an aircraft with the maximum punishments authorized under Article 110.

Section 1023 would amend Article 111 and retitle the statute as "Leaving scene of vehicle accident." As amended, the statute would include the offense of "Fleeing the scene of an accident," which would be migrated from Article 134 (the General article) to place it next to other offenses under the UCMJ involving misuse of vehicles. The offense of fleeing the scene of an accident is a well-recognized concept in criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1024 would amend Article 112 and retitle the statute as "Drunkenness and other incapacitation offenses." As amended, Article 112 would include the offenses of "Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug" and "Drunk prisoner," which would be migrated from Article 134 (the General article). The express exclusion of sentinels and lookouts under Article 112 would be removed in order to resolve the ambiguity between Articles 112 and 113 concerning the "on post" status of sentinels and lookouts. The wrongfulness of being incapacitated for duty or as a prisoner is a well-recognized concept in military criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1025 would amend Article 113 (Drunken or reckless operation of vehicle, aircraft, or vessel), as transferred and redesignated by Section 1001(9), *supra*, to align the BAC limits in the offense to the prevailing legal standard in the United States. All other jurisdictions in the United States, including all fifty states, each territory, the District of Columbia, and the national parks, have established BAC limits no higher than .08 for the offense of drunk driving. The amendment also would provide flexibility for the Department of Defense to prescribe lower breath/blood alcohol limits should scientific developments or other factors in the civilian sector lead to lower limits.

Section 1026 would migrate the offenses of "Reckless endangerment," "Firearm, discharging—willfully, under such circumstances as to endanger human life," and "Weapon: concealed carrying" from Article 134 (the General article) to the redesignated Article 114 (Endangerment offenses), which currently includes the offense of "Dueling." The wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1027 would migrate the offenses of "Threat, communicating," and "Threat or hoax designed or intended to cause panic or public fear" from Article 134 (the General article) to the redesignated Article 115 (Communicating threats). These offenses are well-recognized concepts in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality. The guidance in the Manual for Courts-Martial will continue to reflect the limitations on these offenses established in the applicable case law.

Section 1028 would make a technical amendment to Article 118 (Murder).

Section 1029 would create a new section, Article 119b (Child endangerment), and would migrate the offense of "Child endangerment" from Article 134 (the General article) into the new statute. The new section would align with the closely related offense of "Death or injury of an unborn child" under Article 119a. The offense of child endangerment is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1030 would amend the definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Section 1031 would redesignate Article 120a as "Mails: deposit of obscene matter" and would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into the redesignated statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1032 would create a new section, Article 121a (Fraudulent use of credit cards, debit cards, and other access devices). Article 121a is designed specifically to address the misuse of credit cards, debit cards, and other electronic payment technology, also known as "access devices." This article is modeled on 18 U.S.C. § 1029. It would provide a more effective and efficient means of prosecuting crimes committed with credit cards, debit cards, and other access devices than under current practice, in which such crimes are prosecuted as a larceny by false pretenses under Article 121 (Larceny and wrongful appropriation). When a government-issued credit card, debit card, or other access device is misused, the authorized sentence can be addressed in the Manual through the President's delegated powers under Article 56, which is the current sentencing approach for theft of government property under Article 121.

Section 1033 would create a new section, Article 121b (False pretenses to obtain services), and would migrate the offense of "False pretenses, obtaining services under" from Article 134 (the General article) into the new statute. This change would align the offense of false pretenses with the related UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1034 would amend Article 122 (Robbery) to conform the statute to the offense of robbery under 18 U.S.C. § 2111. Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a family member or others present. Article 122 would be amended to align with 18 U.S.C. § 2111 by removing the words "with the intent to steal" from the statute, thereby eliminating the requirement to show that the accused intended to permanently deprive the victim of his property. The amendments would focus the statute on the true gravamen of this offense: the forcible taking of the property by the accused from the victim, in the presence of the victim.

Section 1035 would create a new section, Article 122a (Receiving stolen property), and would migrate the offense of "Stolen property: knowingly receiving, buying, concealing) from Article 134 (the General article) into the new statute. The offense of receiving stolen property is

a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1036 would amend Article 123 in its entirety and retitle the statute as "Offenses concerning Government computers." The new enumerated punitive article would be similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Computers are used extensively throughout the armed forces, and this proposed offense would facilitate prosecuting computer-related offenses at courts-martial. The new statute would provide a UCMJ punitive article to address computer-related offenses where the gravity of the offense may make Article 92-level punishment inappropriately low, but the misconduct may not meet the criteria of existing punitive articles such as Espionage. The new offense is modeled on 18 U.S.C. § 1030, tailored to address the needs of military justice. It would apply only to persons subject to the UCMJ, and it would be directed only at U.S. government computers and U.S. government protected information.

Article 123 would not supersede or preempt the prosecution of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, Clause 3. Further, service and DoD regulations provide a broadly applicable and flexible means to prosecute less serious computer offenses under Article 92 (Failure to obey order or regulation), and the proposed offense does not supersede or preempt those regulations. Article 108 (Military property of United States—Loss, damage, destruction, or wrongful disposition) covers computer files that have been altered or damaged by the accused through deletion or destruction of computer files or programs for purposes of the offense of willfully destroying military property.

The Manual for Courts-Martial guidance for Article 123 will define and clarify terms, including the term "with an unauthorized purpose," which includes circumstances involving more than one unauthorized purpose, as well as circumstances involving an unauthorized purpose in conjunction with an authorized purpose. The guidance also will reference the UCMJ Article 1(15) definition for "classified information," and will define "protected information" to include information that has been designated as For Official Use Only (FOUO), or as Personally Identifiable Information (PII).

Section 1037 would create a new section, Article 124a (Bribery), and would migrate the offense of bribery from Article 134 (the General article) to the new statute. Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1038 would create a new section, Article 124b (Graft), and would migrate the offense of graft from Article 134 (the General article) to the new statute. Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the UCMJ. Graft is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1039 would migrate the offense of "Kidnapping" from Article 134 (the General article) to the redesignated Article 125 (Kidnapping). The offense of kidnapping is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. The removal of sodomy from Article 125 conforms the statute to the proposed treatment of the offense of forcible sodomy under Article 120 (Rape and sexual assault generally) and the proposal to provide comprehensive guidance on the treatment of animal abuse offenses, including bestiality, under Article 134.

Section 1040 would migrate the offense of "Burning with intent to defraud" from Article 134 (the General article) to redesignated Article 126 (Arson; burning property with intent to defraud). Article 126 currently prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. Article 126 sets out two forms of aggravated arson and one form of simple arson. The offense of burning with intent to defraud is similar to those offenses and is itself a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1041 would amend Article 128 (Assault) to employ a standard that focuses attention on the malicious intent of the accused rather than the speculative "likelihood" of the activity actually resulting in harm, consistent with federal civilian practice.

This section also would migrate the offense of "Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking" from Article 134 (the General article) to Article 128. The offense of assault with intent to commit a serious felony is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1042 would amend Article 129 and retitle the statute as "Burglary; unlawful entry." In the amended statute, the common-law "personal dwelling" and "nighttime" elements would be removed to align Article 129 with the majority rule reflected in federal and state law. As part of the realignment of closely related offenses, the offense of "Housebreaking" would be incorporated into Article 129.

The offense of "Unlawful entry" would migrate as a separate subsection from Article 134 (the General article). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, the offense of unlawful entry does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1043 would redesignate Article 120a (Stalking) as Article 130, and would update current law to address cyberstalking and threats to intimate partners. The proposed amendments would continue to address stalking activity involving a broad range of misconduct including, but not limited to, sexual offenses. The redesignated stalking statute would not preempt service regulations that specify additional types of misconduct that may be punishable at court-martial,

including under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of misconduct from being prosecuted under other appropriate Articles, such as under Article 134 (General article). These uniquely military offenses are available to address similar misconduct that, for example, causes substantial emotional distress or targets professional reputation.

Section 1044 would create a new section, Article 131a (Subornation of perjury), and would migrate the offense of "Perjury: subornation of" from Article 134 (the General article) to the new statute. Migrating this offense would place it alongside similar offenses in the UCMJ. The offense of suborning perjury is a well-recognized concept in criminal law as it corrupts the trial process and interferes with the administration of justice. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1045 would create a new section, Article 131b (Obstructing justice), and would migrate the offense of "Obstructing justice" from Article 134 (the General article) to the new statute. The offense of obstructing justice is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1046 would create a new section, Article 131c (Misprision of serious offense), and would migrate the offense of "Misprision of serious offense" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1047 would create a new section, Article 131d (Wrongful refusal to testify), and would migrate the offense of "Testify: wrongful refusal" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1048 would create a new section, Article 131e (Prevention of authorized seizure of property), and would migrate the offense of "Seizure: destruction, removal, or disposal of property to prevent" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1049 would create a new section, Article 131g (Wrongful interference with adverse administrative proceeding), and would migrate the offense of "Wrongful interference with an adverse administrative proceeding" from Article 134 (the General article) to the new statute. The administrative proceedings addressed by this offense would include any administrative proceeding or action initiated against a servicemember that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. The offense is a well-recognized concept in criminal law.

Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

If, however, a servicemember wrongfully interferes with an administrative proceeding not addressed under this offense, and that interference takes place under circumstances that are prejudicial to good order and discipline or service discrediting, the new Article 131g is not intended to preempt prosecution for wrongful interference in those other administrative proceedings under clauses 1 or 2 of Article 134.

Section 1050 would amend Article 132 in its entirety and retitle the statute as "Retaliation." This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).

Section 1051 would amend Article 134, the General article, to cover all non-capital federal crimes of general applicability under clause 3, regardless of where the federal crime is committed. This change would make military practice uniform throughout the world and would better align it with the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

Section 1052 provides the amended table of sections for the beginning of Subchapter X, the punitive articles, reflecting all proposed new sections and proposed amendments to section headings.

TITLE XI—MISCELLANEOUS PROVISIONS

Section 1101 would amend Article 135 (Courts of inquiry) to provide individuals employed by the Department of Homeland Security, the department under which the Coast Guard operates, the right to be designated as parties in interest when they have a direct interest in the subject of a court of inquiry convened under Article 135. This change would align the rights of employees of the Department of Homeland Security with the rights of employees of the Department of Defense, ensuring consistent application of this statute for all military services.

Section 1102 would make a technical amendment to Article 136 (Authority to administer oaths and to act as notary) to remove from the section heading the authority to act as a notary, which is not provided for in the text of the statute.

Section 1103 would amend Article 137 (Articles to be explained) to require that officers, in addition to enlisted personnel, receive training on the UCMJ upon entry to service, and periodically thereafter. The amendments would provide for specific military justice training for military commanders and convening authorities, and would require the Secretary of Defense to

prescribe regulations for additional specialized training on the UCMJ for combatant commanders and commanders of combined commands. Article 137(d), as amended, would require the Secretary of Defense to maintain an electronic version of the UCMJ and Manual for Courts-Martial that would be updated periodically and made available on the Internet for review by servicemembers and the public.

*Section 1104(*a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.

TITLE XII—MILITARY JUSTICE REVIEW PANEL AND ANNUAL REPORTS

Section 1201 would amend Article 146 (Code committee) and retitle the statute as "Military Justice Review Panel." The Military Justice Review Panel would replace the Code Committee. The Military Justice Review Panel would be an independent, blue ribbon panel of experts tasked to conduct a periodic evaluation of military justice practices and procedures on a regular basis, thereby enhancing the efficiency and effectiveness of the UCMJ and the Code's implementing regulations.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would

issue comprehensive reports every eight years. Within each eight year cycle, the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. Accordingly, the comprehensive reviews are scheduled on an eight-year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Section 1202 would create a new section, Article 146a (Annual reports), to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

TITLE XIII—CONFORMING AMENDMENTS AND EFFECTIVE DATES

Section 1301 contains 25 conforming amendments to the tables of sections necessitated by proposed amendments to section titles.

Section 1302 establishes the effective date of amendments contained in the legislation. The amendments would become effective on the first day of the first month that begins a year after enactment, subject to exceptions for ongoing proceedings, prior offenses, and specific effective dates within the bill.